DOCUMENT RESUME

ED 250 666 CS 007 832

AUTHOR Reilly, James B.
TITLE Educational Malpractice and the Reading Practitioner.
PUB DATE Sep 84
NOTE 28p.; Paper presented at the Annual Meeting of the Reading Association of Ireland (9th, Dublin, Ireland, September 27-29, 1984).
PUB TYPE Information Analyses (070) -- Legal/Legislative/Regulatory Materials (090) -- Speeches/Conference Papers (150)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Academic Standards; Accountability; *Court Litigation; Court Role; *Educational Malpractice; *Educational Responsibility; Futures (of Society); *Legal Responsibility; Public Policy; *Reading Instruction; Teacher Role; Torts

ABSTRACT

Prompted by the increased possibility of teachers facing educational malpractice charges, this paper outlines the historical legal precedents through which plaintiffs have sought recognition for this new cause of action, the defenses established against it, and the rationale on which various courts have balanced their decisions. The paper also discusses predictions on the probable behavior of the judiciary in such actions and the reasoning behind those predictions. Finally, it offers suggestions and comments on the important role of educators in preventing or winning malpractice suits. (HOD)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION
CENTER (ERIC)
X This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.
• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

ED250666

EDUCATIONAL MALPRACTICE AND THE READING PRACTITIONER

by

James B. Reilly, Ed.D.
Professor of Education
Indiana University of Pennsylvania
Indiana, PA 15705

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY
James B. Reilly
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

CS007832

Introduction

It is alleged today that many students move through our educational system without acquiring the basic ability to read and write. Unfortunately, a society floundering in a sea of paper assumes such rudimentary skills. As a result of this inconsistency, educators today are faced with a potential liability unheard of before 1960 - the possibility of personal educational malpractice liability.

This paper will outline the historical legal precedents through which plaintiffs have sought recognition for this new cause of action, the defenses established against it, and the rationale on which various courts have balanced their decisions. Predictions on the probable behavior of the judiciary in such actions and the reasoning behind those predictions will be discussed. Finally, suggestions and comments on the important role of educators in preventing or winning malpractice suits will be presented.

An Historical Background

In 1970 a jury found that John Brockman, a high school graduate who could only read at the seventh grade level, had been denied the acquisition of learning skills implied in his diploma. The jury further found that the local board of education was libel for that failure. This scenario was the creation of Stuart Sandow, and the jury was 200 strong - comprised of attorneys, state legislators, school officials, deans of law schools, and others. Those who responded to Sandow's hypothetical not only found for

the plaintiff but also foresaw the likelihood of such a case occurring within five years.[1]

Only two years passed, however, before the prophecy was fulfilled. In 1972, a California high school graduate reading at the fifth grade level sued the San Francisco public schools on five counts.[2] Peter W. v. San Francisco Unified School District[3] was the first case of its kind in the history of education and the first to claim a cause of action sounding in "educational malpractice". Although similar law suits have occurred only sporadically, this precedent setting case and two others form a trilogy that have resulted in no less that seven published opinions and have spawned a plethora of commentaries.[4] The commentaries are the result of these cases and allegations that it is not unusual for American students to pass through the educational system without learning to read and write.

In Peter W. the trial court dismissed the claim for failure to state a a cause of action and the California Court of Appeals affirmed.[5] The plaintiff failed to convince the court that a legal basis existed for imposing a duty on educators to insure that students graduate from high school equipped with basic survival skills.[6] The California Court held that public policy controls the question of whether or not a school owes a duty of care to its pupils.[7] The court stated:

> Inherent to this [decision to impose a duty of due care] are various and sometimes delicate policy judgments. The social utility of the activity out of which the injury arises, compared with the risks involved in its conduct; the kind of person with whom the actor is dealing; the workability of a rule of care, especially in terms of the parties' relative ability to adopt practical means of preventing injury; the relative ability of the parties to bear the financial burden of injury and the availability of means of which the loss may be shifted or spread; the body of statutes and judicial precedents which color the parties relationship; the prophylactic effect of a rule of liability; in the case of a public agency

> defendant, the extent of its powers, the role imposed on it by law and the limitations imposed upon it by budget; and finally, the moral imperatives which judges share with their fellow citizens - such are the factors which play a role in the determination of duty.[8]

The California Court noted further that an educational malpractice action is simply unmanageable saying:

> [C]lassroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might - and commonly does - have his own emphatic views on the subject. The "injury" claimed here is plaintiff's inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, is influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the contol of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not preceived, recognized but not identified.[9]

Only two years after Peter W. the New York Supreme Court Appellate Division ruled similarly in Donahue v. Copiaque Union Free School District.[10] The plaintiff, Donahue sought five million dollars in damages claiming the defendant school district breached its duty to him by permitting him to graduate even though he lacked basic reading and writing skills and had received failing grades in several subjects.[11] Like the California Court in Peter W., the New York Trial Court dismissed for failure to state a cause of action, and the Appellate Division affirmed.[12]

The New York Court of Appeals subsequently also affirmed, noting that finding a standard of care, proving causation, and measuring injury were not unsurmountable burdens, but "as a matter of public policy" the cause would not be entertained.[13] The New York courts felt that allowing such a cause of action would place the courts in the position of overseer of the

state's public school system - a position that was not theirs and that they did not want. The court refused to accept the proposition that failure of a pupil to learn was the fault of the teacher saying, "The failure to learn does not bespeak a failure to teach."[14]

The third case in this precedent setting trilogy was also a New York educational malpractice case but with a slightly different twist. In Hoffman v. Board of Education,[15] plaintiff Hoffman suffered from a speech abnormality that developed at age thirteen months, immediately after his father's death. Up until that point the child had been developing normally.

At the age of five years when the plaintiff's speech was still unintelligible, his mother took him to the National Hospital for Speech Disorders where he was administered a nonverbal intelligence test, known as the Merrill-Palmer test.[16] The plaintiff achieved an I.Q. score of 90 with a mental age of 4 years, five months compared to his actual age of four years, eleven months.[17] The psychologist's interpretation of the test results included the comment that the plaintiff could work well into the average and even brighter range particularly on form perception and problem solving.[18] When the plaintiff entered kindergarten, he was administered the primarily verbal Stanford-Binet Intelligence Test by a certified clinical psychologist employed by the defendant school district. The test results showed an I.Q. of 74 which indicated borderline intelligence and made the plaintiff eligible for placement in the Children with Retarded Mental Development (CRMD) classes.[19] State law at the time mandated an I.Q. of 75 as the cut off point for placement in CRMD classes. In the psychologist's report of test results and recommendations, he noted that "his [plaintiff's] intelligence should be re-evaluated within a two year period so that a more accurate estimation of his abilities can be made."[20]

The psychologist also noted that the plaintiff showed Mongolian tendencies. No social history was taken of the plaintiff, and his mother was neither told of his diagnosis of retardation nor that by their own rules the school authorities were required to retest if so requested.[21] For the next eleven years the plaintiff remained in classes for the mentally retarded.

In 1968 plaintiff was transferred to the Queens Occupational Training Center (OTC) and at the beginning of his second year was denied reentry because he was "not retarded."[22] This new diagnosis was the result of an I.Q. test administered by the Bureau of Child Guidance. He was given the Wechsler Intelligence Survey for Adults (W.A.I.S.) and scored a full scale I.Q. of 94. His formal I.Q. was 85 and a performance I.Q. was 107. The psychologist's interpretation of the test results include the comment that "his superior performance on tests of non-verbal intelligence as well as the fact that his extremely poor academic background severely depreciated his scores on some verbal tasks, make it very likely that his intellectual potential is at least Bright Normal.[23] In December 1969, the plaintiff was examined by a neurologist and psychologist who noted:

> If ... [one] is treated as a mentally retarded patient, a person who cannot learn or cannot do something that normal children are doing, he assumes in the long run that that's the role that he should be playing in life and so this diminishes his incentive and diminishes the capacity to learn.[24]

An additional I.Q. test was administered in 1970 when plaintiff achieved a performance I.Q. of 114 and an overall I.Q. of 100. Thereafter, the plaintiff was trained by the State Division of Vocational Rehabilitation, but at the age of 26 (the time of trial), he had made no progress in his vocational or social life style.[25]

Following a jury trial, the plaintiff was awarded $750,000 in damages. The New York Appellate Division held that the jury decision that a duty was owing to the plaintiff and was breached was not unreasonable but that damages should be reduced to $500,000.[26] Judge Shapiro, writing for the court, noted that the plaintiff's I.Q. was always normal and although massive problems may have concealed that fact, it should not have mattered.[27] He said that if "they [tests] were right no more would have been lost than the time and expense of a follow-up test to a child who had been originally classified as only one point below that required for normal classroom placement."[28] Judge Shapiro affirmed the trial court and with apparent anger noted:

> Only the test result showing an I.Q. of 74 (and apparently the erroneous references to "Mongolian tendencies" and "Mongoloid features") was acted upon; the rest might as well have been written in sand. The consequences of defendant's failure to follow its own psychologist's recommendations were predictable. So little had to be done to avoid the awesome and devastating effect on that one plaintiff's life, and that little was not done.[29]

Judge Shapiro held this to be an affirmative tort, that is, an act of misfeasance by failure of the school board to follow its own individualized prescriptive course of action. Therefore, it was not subject to the same public policy arguments that nonfeasance educational tort cases such as Peter W. and Donahue would engender.[30] Judge Shapiro noted his agreement with this comment made of the trial decision:

> The thrust of the plaintiff's case is not so much a failure to take steps to detect and correct a weakness in the student, that is, a failure to provide a positive program for the student, but rather, affirmative acts of negligence which imposed additional and crippling burdens upon a student.[31]

Despite a jury verdict and a strong opinion of the Appellate Division, the Court of Appeals in a 4 - 3 decision reversed the order and dismissed the complaint.[32] Judge Jasen, writing for the court, noted that despite the nonfeasance - misfeasance distinction made by the court below, public policy considerations apply with equal force in both situations.[33] Constrained by their decision in Donahue, the court held that public policy precluded judicial interference in the process of educating children and alleged failure to properly evaluate the intellectual capacity of a student would not be recognized as a valid cause of action.[34]

An "educational malpractice" claim is in essence a negligence claim, and, therefore, the claimant must plead and prove the common elements of a negligence cause of action. The formal requirements are conjuctive and all must exist before negligence will be found, the claimant must prove that:

1. The defendant owed a duty to claimant to act in conformity with some standard of care;

2. The defendant failed to act in accorance with that standard.

3. The plaintiff suffered a legally compensable injury, and

4. A proximate causal relationship existed between defendant's breach and the plaintiff's injury.[35]

Duty

The initial refusal by the courts to recognize an educational malpractice cause of action was based on their refusal to recognize that duty, the essential element of a negligent tort, could be shown. Those "200 jurors" who responded to Stuart Sandow's hypothetical, predicted that

negligence and implied contract would be the most probable legal theories of a cause of action. Their predicted defenses to such actions included: no contract, education is not commerce, contributory negligence, assumption of the risk, no guarantee, no warranty, common practice, and "I can't think of one that will stand up;" but they did not predict lack of duty.[36] The courts insist that a plaintiff must establish that any possible defendant "is bound by a duty to educate no matter whether established under theories of common law, statute or contract.[37]

Liability for Physical Injury

One of the first suggestions of commentators for establishing such a duty was by way of comparison to the courts long standing recognition of a teacher's duty to protect students from physical injury.[38] Courts have consistently held educators liable for negligent instruction and supervision which results in physical injury to students in chemistry, shop, home economics, and physical education classes. As one commentator has noted, "while the difference in the content of the instruction may have an effect upon the type of harm suffered by failure to exercise due care, one cannot conclude that the obligation to exercise reasonable care in instruction of students attaches in some subject areas and not in others."[39] Peter W. was the first to argue an extension of this liability to the reading classroom and Reading, the backbone of education, has basically become the keystone of the cause of action.

If liability attaches for negligent supervision, a sound argument can be made for its application to negligent instruction. If instructions are negligently given to a student for the performance of a physical task, and

injury results, a teacher may be held liable. Although much of classroom instruction is supervision, it is the lack of competance of the teacher's instruction that constitutes negligence. An early California case illustrating such a situation is Mastrangelo v. West Side Union High[40], wherein a student was injured during a chemistry experiment and he brought suit against the school district for negligent instruction or supervision. A nonsuit was granted for the defendant, but the appellate court reversed the nonsuit stating:

> It is not unreasonable to assume that it is the duty of a teacher of chemistry, in the exercise of ordinary care, to instruct students regarding the selection, mingling, and use of ingredients with which dangerous experiments are to be accomplished, rather than to merely hand them a textbook with general instructions to follow the text. It is the province of the jury to determine whether the mixing of the ingredients which were used to compound gun powder in a mortar by means of a pestle increased the danger of an explosion; whether the plaintiff was without previous knowledge or instruction regarding that danger, and whether that process was knowingly permitted to be followed by the pupil without warning from the teacher. It may also be a proper question for the determination of the jury as to whether the delivery of a text book to an inexperienced pupil with mere instructions to follow the text, in the performance of a dangerous experiment in chemistry, is a sufficient exercise of care.[41]

Some would argue that there is a clear distinction between negligent supervision and negligent instruction in that the former involves physical injuries and the latter mental; however, compensation for mental injury associated with various torts is common, and courts today even recognize mental injury as an independent tort under such theories as the intentional or negligent infliction of mental distress.[42] Therefore, as one commentator asserts, "the absence of a physical injury does not necessarily mean that recovery should not be permitted for a failure to instruct competently."[43]

Compulsory Education Statutes

Another sound argument being submitted for the recognition of a duty to educate is the almost universal existence of compulsory education statues.[44] If there is no recognized duty to educate, then it is inherently illogical to have such statutes. If the educational system is nothing more than glorified babysitting, then as at least one school district has seriously suggested, perhaps attandance certificates should be issued in lieu of graduation diplomas, because diplomas imply achievement in at least some fashion.[45]

As early as 1901 the constitutionality of compulsory education laws was construed by the Indiana State Supreme Court.[46] The court noted that one of the most important duties of a parent is to educate their children and that the duty is owed not only to the child but to society as well.[47] If there exists no corresponding duty on the part of educators, parents fail to fulfill their duties and the system breaks down. Those who favor the foregoing argument "maintain that the promise of a quality education is implicit in the compulsory education laws."[48]

Minimum Competancy Testing

Proponents of the argument that a legal duty does in fact exist can now also strengthen their argument with the fact that a growing number of states have established minimum competency testing for graduation.[49] This phenomenon may have resulted for a number of reasons, but certainly educator awareness of potential liability and a desire to ensure that those

who received their blessings in the form of a diploma had in fact received their competent instruction, must be considered a paramount reason.

Professional Malpractice Compared

It was inevitable that this new tort of educational malpractice should be compared and contrasted with other forms of professional malpractice already recognized by the courts. This is probably the strongest argument for liability, and many commentators agree that educators should be evaluated in the presently existing common law framework of professional principles.[50] The New York Court of Appeals in affirming the Donahue decision said exactly that:

> It may very well be that even within the strictures of traditional negligence or malpractice, a complaint sounding in "educational malpractice" may be formally pleaded, thus, the imagination need not be overly taxed to invision allegations of a legal duty of care flowing from educators, if viewed as professionals, to their students. If doctors, lawyers, architects, engineers, and other professionals are charged with a duty owing to the public whom they serve, it could be said that nothing in the law precludes similar treatment of professional educators.[51]

In order to successfully invoke this theory, two items must be established, first that an educator is indeed a professional, and second,that an educator's functions may be reasonably analyzed in terms of established malpractice principles.[52] It seems fairly clear that an educator today is accepted as a professional, and this aspect of the issue has not been seriously questioned by either the courts or potential defendants.[53] The second aspect, however, the lack of an established standard of care in the educational profession, may present a major stumbling block both to potential plaintiffs and concerned educators.

Acknowledging that perhaps a legal duty could be set forth, the court in Peter W. pointed out that a negligence cause of action would still be missing an essential ingredient, a standard of care.[54]

A Standard of Care

The difficulty with holding educators to a standard of skill and care ordinarily exercised by other members of their profession [as is done with doctors and lawyers] is that educators have not established minimum standards of skill and care for a given situation. No expert testimony can be provided to give a clear-cut consensus as to what should have been done. Commentators insist that a standard of care can be set, and courts hearing educational malpractice cases have subtly implied a warning to educators that a choice is being set before them - educators set the standards, or the court will. Other professionals such as doctors and lawyers are often faced with judgmental decisions with various courses of action, but these professions have not failed to establish at least identifiable minimum standards of care for certain recurring circumstances. Accordingly, "school authorities should not be able to claim that a lack of a determinate standard of care prevents finding them liable."[55] In this vein, the educational profession should take note of two important and ominous cases. In Scheelhaase v. Woodbury Community School District[56], a teacher contract was not renewed because of her pupils' poor performance on the Iowa Basic Skills Test and the Iowa Test of Educational Development.[57] The trial court ruled for the teacher defendant, but the United States Court of Appeals for the 8th Circuit reversed, supporting the school district and holding that below-average performance on standardized tests

is a sufficient reason to refuse contract renewal.[58] A second dismissal case with ominous overtones is Gilliland v. Board of Education[59], wherein a tenured elementary teacher was dismissed for such things as ruining students' attitudes towards school, not establishing student-teacher rapport, harassing students and giving unreasonable and irregular homework.[60]

Notwithstanding the lack of custom and consensus within the teaching profession itself, suggestions have been made for appropriate standards. The more clearly defined a standard, the more consistently it can be applied, but as William L. Prosser noted, "The whole theory of negligence presupposes some uniform standard of behavior. Yet the infinite variety of situations which may arise makes it impossible to fix definite rules in advance for all conceivable human conduct."[61] Suggested starting points for derivation of standards include state statutes, competancy based teacher education programs (CBTE) and self-imposed administrative regulations.[62] As the appellate division noted in Hoffman, it seems only reasonable for an educational system to act in accordance with its own self-imposed regulations and procedures and to provide remedies for their failure to do so.[63] It is clear, however, that administrative remedies thus far have proved inadequate to redress the wrong suffered by individual plaintiffs.

The courts are patiently waiting for educators to develop their own standards of professional conduct, but 4 to 3 decisions, such as that of the Court of Appeals of New York in Hoffman and dismissal cases such as Scheelhasse, indicate that the courts' patience may be growing thin. A change in the composition of a court along with the appearance of a sophisticated plaintiff may be just the combination necessary for a court

to hold that a duty and standard do in fact exist in a particular case. This will open the door for a flood of litigants who will base their cause of action on standards set not by the profession but set and interpreted by the courts.

Judicial and Legislative Inroads - Prescriptive Education

The United States Supreme Court has already imposed upon educators the obligation to provide particular groups of students with prescriptive, individualized and meaningful education. In Lau v. Nichols[64], the Court mandated bilingual education to non-English speaking students to avoid violating the Civil Rights Act of 1964, to avoid making a "mockery of public education", and to insure that exposure to learning in the classroom did not remain a "hollow privilege."[65] In a similar fashion, legislatures have taken action to provide special groups with a meaningful education. Such legislation as The Education for All Handicapped Children Act of 1975[66] and legislation mandating remedial reading instruction for qualifying students indicate public concern for quality education and accountability.[67]

Special Education, the forerunner of prescriptive education, is dedicated to meeting the individual needs of children, and, therefore, consists of standards against which malpractice could be measured. Such a status implies both the bitter and the sweet - perhaps, although not definitively, a better form of education, but definitely a form of education more susceptible to attack. It must be remembered, however, that an increase in parent and student awareness of educational duty and greater willingness of those plaintiffs to challenge the profession on that basis,

does not mean they will win. The establishment of minimum standards, endorsed and adhered to by the educational profession is perhaps their best defense.

Prescriptive education is and will gradually make its way into all subject areas of education, because its absence in those areas is looked upon by some as inequality of educational opportunity.[68] As one commentator has asked, "Are the Peter W.'s of our schools - native speakers of English and fortunate enough not to suffer from mental or physical deficiencies - any less entitled to educational programs and teaching methods appropriate to their needs?"[69] Special Education will not remain isolated in this regard.

Public Policy Problems

Even if all the hurdles to establishment of a negligent cause of action are successfully surmounted by a sophisticated and persistent plaintiff, the public policy arguments underlying the Court's refusal to acknowledege the action thus far may prove a great challenge. It seems that no matter how the issue is approached, the inquiry turns on a question of public policy. Courts confronted with educational malpractice actions in recent years have affirmed their reluctance to validate such a cause of action regardless of what theory is used to support it or in what context it occurs.[70]

Despite the superficial appearance of teacher immunity from malpractice liability, an indepth reading of the court's decisions has led most commentators to caution against reliance on continued immunity in the future. While the incidence of such cases is not high, the potential

clearly exists for an increase. The courts have implied a veiled threat for potential interference, and commentaries on educational malpractice seem to have at least one thing in common, "uniform enthusiasm for the recognition of some form of judicial remedy for a failure to educate."[71] Policy considerations include clogged court dockets, feigned claims, and economic considerations such as the channelling of money to defending suits as opposed to pursuing educational goals. The public policy problems, however, are not preclusive to a cause of action. In a New York Court of Appeals case, Battalla v. State of New York[72], the first to allow a cause of action for the negligent infliction of mental distress, the court stated:

> We presently feel that even the public policy argument is subject to challenge. Although fraud, extra litigation and a measure of speculation are, of course, possibilities, it is no reason for a court to eschew a measure of its jurisdiction. The argument from mere expediency cannot commend itself to a court of justice, resulting in the denial of a right and remedy in all cases because in some a fictitious injury may be urged as a real one.[73]

Also, it must be remembered that the fact that educational malpractice does not to date constitute a viable cause of action, does not mean that a court is unable to fashion such a cause. In the words of William Prosser,

> The progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before...the law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interest are entitled to legal protection against conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to recovery.[74]

Thus far, legislatures have mandated minimal educational standards only for special sub-groups of students, and the courts have advocated a

fervant hands-off policy. The legislature, should they believe that public policy mandates that an educational malpractice cause of action should not be recognized, could assure such a result by reviving a measure of sovereign immunity - in two decades they have failed to do so. On the other hand, the refusal of courts to recognize the cause of action may be looked upon by some as an attempt to revive a measure of that abrogated immunity. So, as the courts and the legislature fail to agree to disagree, the establishment of professional educational standards remains in a state of flux. It is the educators themselves who must resolve the dilemma. The level of consciousness of the educational profession needs to be raised that they may become aware of the future possibility and probabilty of malpractice liability and so that they, as a profession, may take necessary steps to prevent it.

Considerations for the Future

Suggetions for establishing professional standards, protecting educators, and improving the quality of education have been made by both competent educational and legal scholars. One commentator suggests we start by identifying good professional practices, improving present practices, and eliminating those practices which have the potential for liability for education malpractice.

Arlene H. Patterson, a legal and educational scholar, has discussed the following points as essential in avoiding malpractice litigation.[75]

1) Establish education as a professional practice

2) Look at educators' problem areas

3) Maintain reasonable expectations

4) Increase availability of information concerning legal aspects of education

5) Involve postsecondary institutions in formulating and carrying out educational policies

6) Be involved in the legislative process

7) Demonstrate a willingness and ability to initiate suit or countersue to discourage suits

8) Set minimum standards for student competency

9) Establish specific objective goals and remediation procedures for each grade

10) Encourage colleges and universities to require education courses in diagnosis and prescription

11) Use established minimum competencies and basic skills as partial criteria for progression through the grades and for graduation

12) Require teachers to have some evaluation mechanism

13) Establish individualized education plans

14) Resolve "social promotion" policies

15) Improve methods of reporting pupil progress

16) Be aware of foreseeable risks that accrue when students are negligently placed or promoted

17) Require parental approval for acts affecting student rights, privileges, status, placement

18) Require written confirmation of advice given parents

19) Keep accurate, comprehensive records

20) Issue various kinds of diplomas

21) Improve evaluation of teachers

22) Provide remediation for teachers

23) Observe your own rules

If educators establish their own guidelines, educational malpractice suits can either be avoided or successfully defended. Advice intended for physicians but applicable to educators as well is that:

> Society as a whole accepts the professional's pledge of self-regulation through peer-control, and grants in return privilege and advantages...when charged with negligence, as professionals they enjoy a unique position in the law in that conduct...is judged by professional... standards.[76]

Until educators establish a uniform minimum standard of care, their personal liability remains an open question. Educators of "special students" have been forced into prescriptive educational techniques by the courts and the legislature, and the writing on the wall should be very clear to the educators of all other students.

In a similar vein, Albert Shanker, the President of the American Federation of Teachers, responded very recently in the New York Times to the announcement that a teacher would be the first observer in space. Shanker noted that such feeble attempts to bolster the educational environment were not the answer and that a better remedy existed - to launch teachers into being recognized as a real profession.

> We need what other professions have, "rigorous entry requirements, supervised induction, autonomous performance, peer-defined standards of practice and increased competence."..."In fact, teaching is now much like the legal and medical professions were at the turn of the century. Until fundamental changes were made in the structure of these professions, they, too, were characterized by low wages, easy access, poor training, no real standards of practice, and a poor public image."[77]

Conclusion

The resolution of the elusive concept of educational malpractice is squarely in the hands of educators. The increasing public demand for educational competancy has led the legislatures and courts to establish standards for "special students." Thus far, however, the courts have refused to recognize the validity of a general malpractice suit absent violation of individual prescriptive standards. Courts have made it clear that the legal cause of action could be established and have thus far denied liability only on the basis of public policy. For educators this is a tenuous defense and thus far the courts are allowing room for the educators to remedy this deficiency. If the educational profession fails to establish their own minimum standards of care, a sophisticated plaintiff knocking on the door of a court tired of warning will be heard, and the door will be open for a flood of litigants. When the judiciary finally recognizes a cause of action, a careful balance must be struck between the demand for competancy and the potential social harms of unlimited recognition for educational malpractice. The cause must be carefully limited in scope for the protection of both educators and society. It is the role of the judiciary to protect the interests of society - it is the role of the educational professional to protect the future of its practitioners. "Educators can sit by and wait for a more sophisticated plaintiff to appear and win his suit; or educators can accept the message of the courts thus far - renew faith in themselves as being the best authorities on education - and make some changes that will eliminate many of education's bad practices."[78]

ENDNOTES

1. S. Sandow, Emerging Education Policy Issues in Law: Fraud (Nov. 1970) ("exploratory report" published by Educational Policy Research Center, Syracuse, N.Y.). See also, See You in Court, Saturday Review, Oct. 14, 1972.

2. Peter alleged that the public schools:

   1) "Negligently and carelessly" failed to apprehend his reading disabilities

   2) "Negligently and carelessly" assigned him to classes in which he could not read "the books and other materials"

   3) "Negligently and carelessly allowed him to pass or advance from a course or grade level" with knowledge that he had not achieved either its completion or the skills necessary for him to succeed or benefit from subsequent courses.

   4) "Negligently and carelessly" assigned him to classes in which the instructors were unqualified or which were not "geared" to his reading level, and,

   5) "Negligently and carelessly" permitted him to graduate from high school although he was "unable to read above the eighth-grade level, as required by Education Code 8573...thereby depriving him of additional instruction in reading and other academic skills

   Peter W. v. San Francisco Unified School Dist., 60 Cal App 3d 3d 814 131 Cal Rptr. 854 (1976)

3. Id.

4. See e.g., Can a Student Sue the Schools for Educational Malpractice? 44 Harvard Educational Review 4, Nov. 1974; Vacca, Teacher Malpractice, 8 U. Rich. L.Rev. 447 (1974); Note, The ABC's of Duty: Educational Malpractice and the Functionally Illiterate Student, 8 Golden Gate U.L. Rev. 293 (1978); Note, Educational Malpractice: When Can Johnny Sue:, 7 Fordham Urb. L.J. 117 (1978); Note, Educational Malpractice: Can the Judiciary Remedy the Growing Problem of Functional Illiteracy? 13 Suffolk U.L. Rev 27 (1979); Note, Educational Negligence, A Student's Cause of Action for Incompetent Academic Instruction, 58 N.C.L. Rev. 561 (1980), Educational Malpractice: A Cause of Action in Search of a Theory, 18 San Diego L. Rev 743 (1981); Recovery in Tort For Educational Malpractice: Problems of Theory and Policy, 19 Kan. L. Rev. 195 (1981).

5. Peter W. v. San Francisco Unified School District, 60 Cal App. 3d 814, 131 Cal Rptr. 854 (1976).

6. Id.

7. Id. at 822, 131 Cal Rptr. at 859

8. Id.

9. Id. at 823-24, 131 Cal Rptr. at 860-861

10. 95 Misc. 2d 1, 408 N.Y.S. 2d 584 (1977), aff'd, 64 App. Div. 2d 29, 407 N.Y.S. 2d 874 (1978), aff'd, 47 N.Y. 2d 440, 391, N.E. 2d 1352, 418 N.Y.S. 2d 375 (1979).

11. 64 App. Div. 2d at 30-31, 407 N.Y.S. 2d at 876

12. 95 Misc. 2d, 1, 407 N.Y.S. 2d 584, (1977), aff'd 47 N.Y.2d 440, 391 N.E. 2d 1351, 418 N.Y.S. 2d 375 (1979).

13. 47 N.Y. 2d at 444

14. 407 N.Y.S. 2d 874

15. 64 A.D. 2d 369, 410 N.Y.S. 2d 99 (1978), rev'd 49 N.Y. 2d 121, 400 N.E. 2d 317, 424 N.Y.S. 2d 376 (1979)

16. 64 A.D. 2d at 371

17. Id.

18. Id. at 372

19. Id.

20. Id. at 373

21. Id. at 374

22. Id.

23. Id. at 376

24. Id. at 378. Dr. Kaplan further found that plaintiff had been having symptoms of "being upset, shaking, unable to eat properly, crying, feeling depressed, not sleeping well, walking the floor, had no friends"...and that he had a "defective self image and feelings of inadequacy" Id.

25. Id. at 380

26. Id. at 387. Judge Shapiro held:

> Therefore, not only reason and justice, but the law as well, cry out for affirmance of plaintiff's right to a recovery. Any other result would be a reproach to justice. In the words of ancient Romans: Fiat justitia, ruat coelum (Let justice be done, though the heavens fall). However, the verdict should be reduced to $500,000.

27. Id. at 383

28. Id.

29. Id. at 384

30. Id. at 385-86

31. Id. at 386 (quoting Professor David A. Diamond, 29 Syracuse L. Rev. 103, 150-151)

32. 49 N.Y. 2d 121, 127

33. Id. at 126

34. Id. at 123

35. William L. Prosser, Law of Torts. 4th Ed. (St. Paul, Minn: West Publishing Co., 1971), p. 143

36. S. Sandow, Emerging Education Policy Issues in Law: Fraud (Nov. 1970) ("exploratory report" published by Educational Policy Research Center, Syracuse, N.Y.).

37. Note, The ABC's of Duty: Eductional Malpractice and the Functionally Illiterate Student, 8 Golden Gate U.L. Rev. 293, 295 (1978)

38. Id. at 299

39. Id. at 301 (quoting appellant's brief in Peter W.)

40. 2 Cal. 2d 540, 42 P.2d 634 (1935)

41. Id. at 542, 42 P. 2d at 636 (emphasis added).

42. Recovery in Tort for Educational Malpractice: Problems of Theory and Policy, 29 Kan. L. Rev. 195, 211 (1981)

43. Id.

44. Every state in the union except Alabama has a compulsory education statute. See Note, The Right to Education - A Constitutional Analysis, 44 U. Cin. L. Rev. 796, 799 n 17 (1975).

45. See Note, supra, n. 37 at 315 and n. 82.

46. State v. Bailey, 157 Ind. 324 61 N.E. 730 (1901).

47. Id. at 329-30, 61 N.E. at 732

48. Educational Malpractice, When Can Johnny Sue? VII Fordham Urban Law Journal 118, 122 (1978). See also Lau v. Nichols, 483 F. 2d 791, 804, 1973 (Hill, J., dissenting) ("When the states chooses to provide education and makes attendance at school compulsory, it has a duty to grant to each child an equal educational opportunity..." See also, Frederick L. v. Thomas, 419 F. Supp. 960 (E. D. Pa. 1976), wherein the court noted:

> It seems clear that the duty to educate and the requirement of compulsory attendance are not strange bedfellows. A foundation has been laid in the California Constitution and by the California courts which, bolstered by federal decisions, could establish yet another basis for requiring the schools to teach their students how to read.

49. McClung, Competency Testing: Potential for Discrimination, 11 Clearinghouse Rev. 439, 440 (1977).

50. Note, Educational Negligence, A Student's Cause of Action for Incompetent Academic Instruction, 58 N.C.L. Rev. 561, 567.

51. 47 N.Y. 2d at 441-42, 391 N.E.2d at 1353, 418 N.Y.S. at 377.

52. Note, 58 N.C.L.Rev. 561 at 567-68.

53. Id.

54. See Note, ABC's of Duty: Educational Malpractice and the Functionally Illiterate Student, 8 Golden Gate L. Rev 293, 297 and n. 18 (1978).

55. Note, Educational Malpractice: When Can Johnny Sue? VII Fordham L.J., 117, 127 (1978).

56. 349 F. Supp. 988 (N.D. Iowa 1972) Rev'd. 488 F. 2d 237 (8th Cir., 1973), cert denied, 41 U.S. 969 (1984).

57. Id.

58. Id.

59. 365 N.E. 2d 322 (1977)

60. Id.

61. William L. Prosser, Law of Torts, 4th ed. (1971) p. 149

62. See Note, Supra n. 50 at 576-78

63. 64 A.D. 2d at 385

64. 414 U.S. 563 (1974)

65. Id. at 566

66. P.L. 94-142

67. See e.g., Sugarman, Accountability through the Courts, 82 School Rev. 233 (1974), Aaron, Evaluation and Accountability, in New Horizons in Reading 558 (1976); L. Strain, Accountability in Reading Instruction (1976).

68. See Note, supra n. 37 at 310

69. Id.

70. Educational Malpractice: A Cause of Action in Search of a Theory, 18 San Diego L. Rev. 743, 746 (1981). See also, Helm v. Children's School, 103 Misc. 2d 1053 (1979) ("as a matter of public policy a cause of action in educational malpractice will not be recognized whether against a public or private school"); Smith v. Alameda City Soc. Serv. Agency, 153 Cal. Rptr. 712, 90 Cal. App. 3d 943 (1978) (Peter W. held to be dispositive of Educational Malpractice issue); Washington v. City of N.Y., 83 App. Div. 2d 866 (1981) (monetary damages for educational malpractice not recoverable; Aubrey v. School Dist. of Philadelphia, 437 A.2d 1306 (1981) ("the discretion of school authorities will be interferred with only when there is a clear abuse of it and the burden of showing such an abuse is a heavy one."); Paladino v. Adelphi Univ., 110 Misc. 2d 314, rev'd 89 A.D. 2d 85 (1982) (no recovery against private school for breach of implied contract for failure to provide quality education).

71. 10 N.Y. 2d 237, 176 N.E. 2d 729, 219 N.Y.S. 2d 34 (1961)

72. Id. at 240-41, 176 N.E. 2d at 731, 219 N.Y.S. 2d at 37.

73. William L. Prosser, Law of Torts, 4th ed. (1971) p. 3

74. Patterson, Arlene H., How to Avoid an Educational Malpractice Suit, School Law Update, NOLPE (1984) p. 69-93.

75. W. Alton, Jr. Malpractice: A Trial Lawyer's Advice for Physicians (How to Avoid, How to Win) 100 (1977).

76. Shanker, Where We Stand, Launch Teachers into Real Profession, N.Y. Times, Sept. 2, 1984 § E7, Col. 5.

77. See Note, supra, n. 50 at 597.

78. See Note, supra, n. 74 at 74.